

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs September 26, 2007

**STATE OF TENNESSEE v. BILLY JOE ELLIOTT**

**Appeal from the Criminal Court for Washington County  
No. 31703 Robert E. Cupp, Judge**

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**No. E2007-00486-CCA-R3-CD - Filed February 19, 2008**

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The defendant, Billy Joe Elliott, appeals from his conviction of obtaining or attempting to obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge, a Class D felony. The defendant, a Range I offender, was sentenced to two years, with ten days to be served in jail and the remainder on probation. In this appeal, the defendant claims that the evidence does not support his convictions and that the trial court erred in not granting judicial diversion. Upon review, we affirm the defendant's conviction.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Jerry J. Fabus, Jr., Gray, Tennessee (on appeal), and Eric Daniel Reach, Johnson City, Tennessee (at trial), for the appellant, Billy Joe Elliott.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Anthony Wade Clark, District Attorney General; and Michael Rasnake, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

Mark Reed testified that he was employed as a pharmacist at Princeton Drug. He said that the defendant and his wife had been customers of Princeton Drug for several years. He said he knew the defendant on sight. He said that on the morning of March 23, 2005, a prescription was presented for the defendant's wife, Tammy Elliott. He said he did not know who dropped off the prescription, which was for the drugs Oxycontin, Phenergan, and Provera. He said that it took about an hour to process the prescription and that the defendant was sitting in the pharmacy's waiting area during that time. He said that the insurance rejected the prescription and that the defendant was informed that the pharmacy would have to contact the doctor's office for authorization. He said the pharmacy checked with the doctor's office after faxing the prescription to the doctor's office and was told that

the doctor's office did not issue the prescription for Oxycontin. He said that the defendant had left the pharmacy by this point and that he called Tammy Elliott about the problem but did not recall exactly what was said. He said the doctor's office called and asked the pharmacy to turn the matter over to the authorities.

Mr. Reed said that if there had been no problem with the insurance, the Oxycontin prescription would have been filled, and that the pharmacy would have allowed either the defendant or Tammy Elliott to pick up the prescription. He identified the copy of the prescription which the pharmacy kept for its records, and the copy was received as an exhibit.

Melissa Heaton testified that she was employed at Princeton Drug and was working on March 23, 2005. She said the defendant came into the pharmacy and sat down. She said that Tammy Elliott was in her car at the drive-through window and that after Tammy Elliott left the window, the defendant left the pharmacy. She said she did not see who presented the prescription and did not recall whether either the defendant or Tammy Elliott came back to pick up the prescription. When asked how long the defendant and Tammy Elliott were at the pharmacy, she first said "[m]aybe five minutes, or a little bit longer" but then said she did not know.

Brenda Shipley testified that she was employed as a nurse for Doctor Charlotte Keene. She said she received a phone call in March 2005 from Princeton Drug requesting pre-authorization from TennCare for an Oxycontin prescription. She said she was suspicious because Doctor Keene does not issue prescriptions for Oxycontin. She said she had the pharmacy fax the prescription to her, and when she compared the name and birth date on the prescription with the medical records, she discovered that the doctor did not have a patient by that name. She said that the handwriting on the prescription was neither hers nor Doctor Keene's and that the signature was not Doctor Keene's. She said she informed the pharmacy that the prescription was not written by Doctor Keene for a patient of the practice and requested that the pharmacy notify the authorities.

Ms. Shipley testified that she received a call from a person asking about the prescription. She said she called the pharmacy to verify whether someone there had made the call but was told that no one had done so.

Doctor Charlotte Keene testified that on March 23, 2005, she reviewed a prescription which was purportedly from her office. She said she did not write the prescription. She also said Tammy Elliott was not her patient and to her knowledge had never been. She said she used to have prescription pads in various places, such as the operating room drawer or in labor and delivery. She said that since this incident, that practice had been changed. She said she had no idea how one of her prescription pads had been stolen. She said she did write prescriptions for Provera and Phenergan frequently. She said, however, that she did not write prescriptions for Oxycontin in the form prescribed on the prescription in question and that she would instead write prescriptions for Percocet or Tylox.

Frank Peters testified that he was an investigator with the Johnson City Police Department and that he had investigated the prescription in question in March 2005. He said the original of the prescription had been misplaced. He said that during the time of this investigation, Christopher Casey and his wife had also been investigated for obtaining narcotics by fraud and charged with thirty to forty counts relative to that investigation, as well as with theft and TennCare fraud. He said he learned through his investigation that the Caseys and their children were living with the defendant and his wife during the relevant time period. He said Ms. Elliott told him that she did not loan her car to others.

Tammy Elliott testified for the defendant. She stated that she had worked as a correctional officer but was presently unemployed due to a neck injury. She said she and the defendant had been married for ten years. She said the defendant's nephew, Christopher Casey, and his family had lived with the Elliotts for about a month after being evicted from their home. She said the approximate dates the Caseys lived in the Elliott home were February 27 until March 29. She said Leanne Casey, who was Christopher Casey's wife, was employed as a nurse. She said Christopher Casey had worked at ADT Security and "was acting like he was going to work for a couple of weeks there, and then we found out that he had been terminated." She said that during the time the Caseys were living with them, the Elliotts would get up, take their children to school, and go to Ms. Elliott's grandmother's house. She said they went to her grandmother's house "so we didn't have to set [sic] there with them."

Ms. Elliott testified that on March 23, 2005, the Elliotts took the children to school and went to her grandmother's house. She said they were at her grandmother's house from shortly before 8:00 until after 11:00 a.m. and did not leave at any point. She said they left around 11:00 and went to look at a house. She said that as they were leaving the house, her grandmother called and told her that Mark the pharmacist had called and that she had given him Ms. Elliott's cellular telephone number. She said Mark called her and asked about a prescription in her name which was left at the pharmacy. She said she told him that she did not know anything about it and that he should call the police.

When shown the copy of the prescription, Ms. Elliott said that she had never seen it and that the handwriting was not hers. She said it was possible that Christopher Casey could have used her car. She said she kept the keys hanging by the door. She said that she was driving her Geo on March 23, 2005, but that she also had a Mustang.

Ms. Elliott acknowledged that she had been taking Lortab for her neck injury since December 2005. She said she was injured in a car accident in October 2005.

Ms. Elliott testified that she had been a customer of Princeton Drug for about ten years. She denied that she had gone there on March 23, 2005. She said the pharmacy had her grandmother's telephone number listed for her because she and the defendant had lived with her grandmother for about a year and she had not changed the number since then.

June Tilson testified that she was Tammy Elliott's grandmother. She said there was a two or three month period of time in early 2005 in which the Elliotts came to her house every morning. She said they came to assist her in caring for her disabled husband. She said that they usually arrived around 8:00 and that they sometimes left around 11:00 and sometimes left at 2:00 or 3:00.

Ms. Tilson testified that on March 23, 2005, the Elliotts came to her house around 8:00 a.m. She said that at about 11:00 a.m., she received a call from Mark at Princeton Drug, who asked for Tammy Elliott. She said that the Elliotts were pulling out of the driveway and that she told him to call Ms. Elliott's cellular telephone number.

After receiving the evidence, the jury found the defendant guilty of acquiring or obtaining or attempting to acquire or obtain possession of a controlled substance by fraud, a Class D felony. See T.C.A. § 53-11-402. The trial court sentenced the defendant, a Range I offender, to a two-year sentence, with ten days to be served in jail and the balance on probation.

## I

The defendant challenges the sufficiency of the convicting evidence. Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

The statute describing the crime of which the defendant was convicted provides that it is an offense to "acquire or obtain, or attempt to acquire or obtain, possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge." T.C.A. § 53-11-402(a)(3). In addition, a defendant is criminally responsible for an offense committed by another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the [defendant] solicits, directs, aids, or attempts to aid another person to commit the offense." T.C.A. § 39-11-402(2). Criminal responsibility is not a separate crime but is "solely a theory by which the State may prove the defendant's guilt of the alleged offense . . . based upon the conduct of another person." State v. Lemacks, 996 S.W.2d 166, 170 (Tenn. 1999).

The defendant argues that the state's proof was deficient because it is devoid of evidence that the defendant was the person who prepared the forged prescription and presented the prescription at the pharmacy. In the light most favorable to the state, the evidence demonstrates that the defendant and his wife went to Princeton Drug with a prescription for the defendant's wife from a doctor who did not write the prescription and did not treat the defendant's wife. The pharmacy

employees were familiar with both the defendant and his wife and able to identify the defendant as being present. The defendant waited while the pharmacy staff worked on filling the prescription. The defendant was advised that the staff would have to call the doctor's office for authorization, and the defendant and his wife left the pharmacy before completing the transaction. The defendant's nephew and his nephew's wife, a nurse, were also involved in obtaining drugs through fraudulent prescriptions, and the couple were living in the defendant's home at the time of the offense. From the evidence, a rational jury could find beyond a reasonable doubt that the defendant was guilty of the offense either through a theory of direct culpability or a theory of criminal responsibility. Thus, the defendant is not entitled to relief.

## II

The defendant also claims that the trial court erred in denying him judicial diversion. He argues that the trial court improperly denied diversion based upon the defendant's continued claim of innocence of the offense. The state disagrees, arguing that the trial court was concerned with the defendant's lack of candor and also based its denial on the circumstances of the offense.

A defendant is eligible for judicial diversion when he or she is found guilty or pleads guilty to a Class C, D, or E felony and has not previously been convicted of a felony or a Class A misdemeanor. See T.C.A. § 40-35-313(a)(1)(B). Judicial diversion allows the trial court to defer further proceedings without entering a judgment of guilt and to place the defendant on probation under reasonable conditions. Id. When the probationary period expires, if the defendant has completed probation successfully, then the trial court will discharge the defendant and dismiss the prosecution with no adjudication of guilt. See id. at (a)(2). The defendant may then apply to have all records of the proceedings expunged from the official records. See id. at (b). A person granted judicial diversion is not convicted of an offense because a judgment of guilt is never entered. See id. at (a)(1)(A).

Judicial diversion is not a sentencing alternative for a defendant convicted of an offense. See T.C.A. § 40-35-104(c). Therefore, the presumption of favorable candidacy afforded certain offenders at the time of the offense in this case did not provide the defendant with a presumption of favorable candidacy for judicial diversion. See T.C.A. § 40-35-102(6) (2003); State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). When a defendant challenges the manner of serving a sentence, this court conducts a de novo review of the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). However, when the accused challenges the trial court's denial of a request for judicial diversion, a different standard of appellate review applies. Because the decision to grant judicial diversion lies within the sound discretion of the trial court, this court will not disturb that decision on appeal absent an abuse of discretion. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). An abuse of discretion exists if the record contains no

substantial evidence to support the denial. State v. Hammersley, 650 S.W.2d 352, 356 (Tenn. 1983); Bonestel, 871 S.W.2d at 167.

In determining whether to grant judicial diversion, the trial court must consider (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; (6) the deterrence value to the defendant and others; and (7) whether judicial diversion will serve the ends of justice. Electroplating, 990 S.W.2d at 229; State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996); Bonestel, 871 S.W.2d at 168. In addition, "the record must reflect that the court has weighed all of the factors in reaching its determination." Electroplating, 990 S.W.2d at 229. If the trial court refused to grant judicial diversion, it should state in the record "the specific reasons for its determinations." Parker, 932 S.W.2d at 958-59. If the trial court "based its determination on only some of the factors, it must explain why these factors outweigh the others." Electroplating, 990 S.W.2d at 229.

The defendant concedes that the trial court considered the required factors. He also acknowledges that the trial court stated that four factors weighed against diversion: (1) deterrence to the defendant, (2) the ends of justice, (3) the defendant's lack of credibility, and (4) the fact that the crime was a planned offense between the defendant and his wife. He claims, however, that the trial court's focus on the defendant's claim of innocence demonstrates that this was "the only true reason" for the diversion denial.

The defendant is correct that diversion may not be denied solely on the basis that a defendant denied his guilt of the offense. See, e.g., State v. Lane, 56 S.W.3d 20, 29 (Tenn. Crim. App. 2000). However, a defendant's denial of guilt which exposes the defendant as being untruthful with the court is a proper basis for denying diversion. See, e.g., id. In the present case, the record reflects that the trial court made a conscientious review of the relevant factors along with the facts of the defendant's case. Although the court was very concerned about the defendant's lack of credibility as reflecting poorly on his prospects for rehabilitation, the court noted additional factors which it weighed against granting diversion. Further, the court made it clear that its concern with the defendant's denial of any involvement in the offense was based upon the fact that the claim of innocence was completely incredible given the evidence to the contrary. Upon consideration, we hold substantial evidence exists to support the denial of diversion. See State v. Anderson, 857 S.W.2d 571, 573-74 (Tenn. Crim. App. 1992) (holding that trial court properly denied diversion based upon defendant's lack of credibility in blaming another person for the offenses and fact that offenses required planning between defendant and another person).

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE